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IN THE

Supreme Court of the United States

October Term, 1942.

No. 955

FRANK VALENTI, *Petitioner,*

v.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

I. MAURICE WORMSER,
EDMUND CLYNES,
Counsel for Petitioner.

BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

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IN THE

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FRANK VALENTI, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Frank Valenti, defendant, respectfully prays for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit to review a judgment of that Court entered on March 22nd, 1943. (R. 291.)

A.

Summary of Matter Involved.

The defendant was convicted of conspiracy to violate various sections of the Internal Revenue Code and was sen-

tenced to imprisonment and a fine (R. 804). The indictment charged defendant and others with having conspired to violate sections of the Internal Revenue Code from January 15, 1935, until August 31, 1941. Four defendants were found guilty, four were acquitted, seven pleaded guilty before trial and one was discharged at end of government's case.

Petitioner was charged in *three* overt acts.

The *second* overt act, set forth in the indictment, charged that in 1935 he was arrested at a still with one Carl Dimino (FF. 57-83; 188-200). Petitioner was discharged by U. S. Commissioner and defendant Dimino was absolved of present conspiracy by Court in instant case at end of Government's proof.

The *fifth* overt act charged petitioner and his wife with having a still in their possession February 9, 1937 (FF. 21, 22). Both petitioner and his wife were tried, convicted and sentenced for this offense (F. 735). The evidence relied upon by the Government convicted petitioner as a landlord and not as an operator of the illicit still (FF. 206, 207, 212-216).

The *eleventh* overt act charged petitioner, together with defendants, Frank Dimino and John De Vito, with riding in an automobile in the City of Jamestown, New York, in July 1939, containing equipment which could be used in an illicit distillery (F. 27) (FF. 218-244). No charges were then made for violation of Internal Revenue Laws.

During 1940, agents of Internal Revenue Department trailed various defendants and proof was introduced that

cars of various defendants were parked near petitioner's home or in vicinity of a reputable Club frequented by various defendants (FF. 398, 436, 438, 490, 491, 552, 553). Throughout this period petitioner's car was never seen at any place where a seizure had occurred or where any was subsequently made (309). Practically all defendants were his relatives. [Judge Clark erroneously refers to contact with one Lo Tempio not in conspiracy—the person being Joseph Valenti, brother of petitioner.] (F. 286—fol. 287.)

The government charged that a minor repair job (263-264) was done on petitioner's car at a garage where other cars of co-conspirators were serviced (255-281). The government also relied heavily upon the fact that petitioner had an unlisted telephone number and one call was made from the home of Conti, the younger (acquitted by jury), in Jamestown to the Rochester home of petitioner. Furthermore, on September 8, 1937, an illicit still was seized at East Eden, New York; and from the bill fold of the alleged operator, who is not mentioned in the present indictment, a card was taken containing on its back the petitioner's telephone number in writing (247, 248).

Jurisdiction.

Petitioner was convicted of violating Section 88 of Title 18 U. S. C. A. This Court's jurisdiction rests on Sec. 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. Sec. 357). Also Rule XI of Rules of Practice and Procedure in Criminal Cases, promulgated by this Court May 7, 1934.

Questions Presented.

1. Whether the Court below applied the correct rule in holding that it was for the jury to say whether petitioner was a member of the conspiracy.

2. Whether reversible error was committed when the Government witness, Agent Maguire, testified that, while talking to petitioner's brother and son upon the occasion of their arrest, he said, "I would give a thousand dollars to have your father where you are," etc.

Reasons Relied on for Granting Writ.

1. Petitioner contends that the decision of the Circuit Court of Appeals is in conflict with the decision of the Fifth Circuit in

Kassin vs. U. S., 87 Fed. 2nd 183, 184.
U. S. vs. Copeland, 90 Fed. (2nd) 78.

2. An important rule of evidence was nullified, and the Circuit Court of Appeals did not follow the New York Court of Appeals ruling in People vs. Robinson, 273 N. Y. 438, a case closely in point.

WHEREFORE, it is respectfully submitted that this petition for a writ of certiorari should be granted.

FRANK VALENTI,
Petitioner,
By I. MAURICE WORMSER, and
EDMUND CLYNES,
Counsel for Petitioner.

IN THE

SUPREME COURT OF THE UNITED STATES.

October Term, 1942.

No. .....

FRANK VALENTI, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

The District Judge denied a motion for a new trial and the opinion of Judge Clark for the Circuit Court of Appeals has not been reported but is printed at pp. 285-295 of the Record.

Jurisdiction.

Reference to the statute under which the jurisdiction of this Court is invoked, and a statement of the questions presented, as well as a statement of the case, will be found in the petition.

Summary of Argument.

All of the circumstances relied upon by the Government to show appellant's guilty association with the alleged con-

spiracy are as consistent with the hypothesis of innocence as with guilt. Practically all the defendants are closely related to one another either by blood or marriage (398, 436, 438, 490, 491, 552, 553). Association among the defendants to much greater extent than is shown by the record under review could be explained by the relationship existing among them. Throughout the year in which agents of the Government constantly followed petitioner, not a scintilla of evidence was found which might even tend to show that he was connected with any wrongful conspiracy.

The Trial Court, prior to the decision in Braverman vs. U. S., 63 S. Ct. 99, charged that the three year Statute of Limitations applied, and the jury may have ruled out overt acts 2 and 5. As to the small repair job at the garage a sufficient answer is that sizeable discounts were allowed when cars were brought in the names of either Joseph Valenti or Frank Dimino. As to the finding of petitioner's telephone number at the East Eden still a ready explanation is that petitioner bought bankrupt stock and his telephone number might well have become known through circulation as a result of his business connections (714, 715, 721, 722). While defendant did not take the stand the proof is not convincing that appellant had no regular occupation. Through his wife he was an owner of large real estate holdings and the government agent admitted that he dealt in bankrupt stock (547-548). Certainly there is nothing sinister in having an unlisted 'phone as many professional and business men (179-183-282 supplemental record) have such 'phones. And but one call was made from home of Conti, an acquitted co-defendant, to home of petitioner (279 Supplemental record).

The Court below refers to (291) testimony that petitioner rode with other members of group carrying tools of

trade. This is not sufficient to warrant a finding he was connected with the operation of a still. Also, similar pumps are used on a farm (F. 239) and to test specific gravity of liquids.

Petitioner was seriously prejudiced by the improper statement of the experienced Government Agent Maguire discussed under Point II.

ARGUMENT.

POINT I.

The judgment below is inconsistent with the determination in other Circuit Courts of Appeal to the effect that facts creating mere suspicion of guilt will not support a conviction of conspiracy.

In the Circuit Court the petitioner urged the holding that all inferences drawn from facts in evidence must be consistent only with guilt and inconsistent with every reasonable hypothesis of innocence. This is the holding in *U. S. vs. Kassin*, 87 F. (2nd) 183, 184.

The Court held (fol. 289) that such a rule of proof is so burdensome that, if literally followed, it would operate to protect the shrewder criminal. The Court goes on to state that this does not represent the majority rule and cites state cases to support their point, one a recent Conn. case, State vs. Murphy, 124 Conn. 554. The case of United States vs. Becker, 62 F. 2d 1007, is not decisive of the present state of facts and L. Hand, *J.*, admits that other Circuits have decided a contrary doctrine that no separate charge is to be

made suggesting that circumstantial evidence is on a different and lower plane than other forms of evidence.

All the decisions cited by the Circuit Court (fol. 290) are much stronger as far as the facts are concerned than the present case. The decisions in:

Pollock vs. U. S., C. C. A. 79 Fed. (2nd) 872,
De Luca vs. U. S., C. C. A. 298 Fed. 412,
Wright vs. U. S., C. C. A. 227 Fed. 855, 857,

support the holding in Kassin vs. U. S., *supra*.

POINT II.

The Trial Court committed reversible error in receiving prejudicial testimony of government agent Maguire, over appellant's objection and exception, that Maguire stated to petitioner's brother and son upon the occasion when they were arrested: "Is this a nice place for you two kids to be? I would give a thousand dollars to have your father where you are. I do not get my fun in arresting nineteen year old boys".

This remark had an extremely prejudicial effect upon the jury. Judge Clark inadvertently incorrectly stated (290) that the trial court appears never in fact to have ruled on the matter. In the Supplemental Record at bottom of page six and at top of page seven, it was stipulated by the United States Attorney that the Court *overruled the objection* and that an *exception was duly taken.*

The situation was much like that in the leading case of People vs. Robinson (273 N. Y. 438) where the New York Court of Appeals reversed a conviction. Judge Lehman said, at pp. 443-4, in regard to a similar remark, "More

serious harm resulted from the examination of the witness Abramson. As we have pointed out, he is an attorney, appointed senior securities accountant after passing a civil service examination, and attached to the Department of Law. A jury might reasonably be impressed by his qualifications and give weight to his opinions."

In this case, Maguire, the Government agent, had been to law school two years (627-628) and was an experienced investigator.

The prosecutor conducted his summation along the same prejudicial line (~~815~~), for the Trial Judge, at the very outset of his charge, said:

> "Members of the jury, the Government's attorney has made some reference in his examination to the big fellows or ring-leaders and the small fry who worked at the stills. I want to say to you at the outset that the rules of law and the basis that you should apply in considering the guilt or innocence of all the defendants is exactly the same, whether he be a ring-leader or small fry. Each is entitled to a fair and impartial consideration of his case, no more and no less." (750.)

The case was close as to this petitioner. The jury deliberated nearly twenty-three hours (791-797). Certainly the point was not an afterthought, as in United vs. Manton, 107 Fed. (2nd) 834, 847 (cited below), as the objection appeared in the motion for a new trial and in the assignments of error. (815.)

As to what evidence is prejudicial the Second Circuit has laid down a peculiar test. In United States vs. White, 124 F. (2nd) 181, 186, that Court said:

> "No judge in so extended a trial can avoid an occasional ruling that on reflection he will see to have been

wrong; but, unless they cut off some real substantial aspect of the truth, or let in too distracting issues, they are not important. And in this connection we wish to suggest that the disposition to rule out evidence because it offends against some canon of the law of evidence is to be discouraged; admission seldom does any harm, while exclusion often proves extremely embarrassing in sustaining a judgment fundamentally just."

It is respectfully submitted that this court has never applied so extreme a rule. It certainly is not the law of New York (see *People v. Nitzberg*, 287 N. Y. 183).

As to the Circuit Court's (fol. 292) holding that defense counsel by his long cross-examination of Maguire had waived the point now raised, the Court overlooked the practical exigencies of the situation. A party does not waive his objection and exception by attempting to disprove the matters testified to or by seeking to prove facts inconsistent with them. "A party excepting to the admission of testimony is not bound to concede its truth, or to refrain from combating it, in order to retain his exception."

Martin vs. N. Y. N. H. R. R., 103 N. Y. 626, 630;
Wigmore on Evidence (3rd Ed. 1940) Sec. 18, p. 344, and note 34.

The case of United States vs. Gruber, 123 F. (2nd) 307 (cited below) is not controlling or in point. There it was held that since defendant took the stand he waived any error that might have been made as to the cross examination of other witnesses. Here petitioner did not take the stand and cannot be held to have waived under the circumstances.

It is respectfully submitted that we not only have a conflict of decisions but also a question of general public im-

portance whether a ruling on evidence handed down by the New York Court of Appeals should be followed.

In the instant case, the proof against petitioner was very meager, the error in evidence was substantial, and the question of substantive law involved is of general public importance in these days of so many drag-net conspiracy indictments.

A Writ of Certiorari should therefore issue.

I. MAURICE WORMSER,
EDMUND CLYNES,
Counsel for Petitioner.

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In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 955

FRANK VALENTI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 285–291) is not yet reported.

JURISDICTION

The judgment of the circuit court of appeals was entered on March 22, 1943 (R. 291–292). The petition for a writ of certiorari was filed April 24, 1943. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rule XI of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Whether the evidence of petitioner's association with the conspiracy alleged and proved was sufficient to warrant submission of the question of his guilt to the jury.

2. Whether petitioner was prejudiced by the admission in evidence of certain testimony of the Government witness McGuire on cross-examination.

STATUTE INVOLVED

Section 37 of the Criminal Code (18 U. S. C. 88) provides:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both.

STATEMENT

On September 25, 1941, petitioner and twenty others were charged in a one-count indictment, filed in the District Court for the Western District of New York, with conspiracy to violate the Internal Revenue laws relating to liquor (R. 1–12, 15).[1] Six of the defendants pleaded guilty at the

[1] The object of the conspiracy, as alleged in the indictment, were as follows: To possess unregistered stills; to engage in the business of a distiller without giving bond,

opening of the trial,[2] and petitioner was tried with eight of the remaining defendants (R. 2).[3] The indictment was dismissed as to one of these, Carl Dimino, at the close of the Government's case (R. 2, 233–234), but petitioner's motion to dismiss the indictment, based principally upon the alleged insufficiency of the evidence and made both at the close of the Government's case and at the conclusion of all the evidence, was denied (R. 232–234).

Four of the defendants were acquitted;[4] petitioner and three others[5] were found guilty (R. 266). After denying petitioner's motions to set aside the verdict and for a new trial, which were based upon all of the grounds and objections previously advanced (R. 266–267), the court sen-

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registering, and posting the required sign, and to defraud the United States of the tax on the spirits distilled; to carry on the business of a rectifier without paying the special tax therefor; and to transport, remove, and conceal distilled spirits upon which no tax had been paid (R. 3–6). Nineteen overt acts were alleged to have been committed in furtherance of this conspiracy (R. 6–12).

[2] Those who pleaded guilty were Frank Dimino, Francis Greco, Rose M. Greco, John Capone, Charles Salli and John De Vito.

[3] Of the other six defendants, the indictment was dismissed as to one, Joseph Conti, Sr., on motion of the Government (R. 2); a severance was granted as to one, Joseph Randazzo, who was serving an indefinite term of imprisonment in a New York State Reformatory; and two, Antonio and Salvatore Valenti, were never apprehended.

[4] Those acquitted were Concetta Morreale, Mary Valenti, Andrew Dimino, and Joseph Conti, Jr. (R. 2).

[5] Joseph, Alphonse A., and Alphonse J. Valenti.

tenced him to serve 16 months' imprisonment and to pay a fine of $1,000 (R. 16, 268). On appeal by petitioner alone, his conviction was affirmed (R. 285–292).

Since petitioner does not attack the sufficiency of the evidence to establish the existence of a conspiracy between some or all of the defendants, the evidence in that connection may very briefly be summarized as follows:

During the period of the alleged conspiracy—January 15, 1935, to and including August 31, 1941—federal officers seized seven illicit stills in the western part of New York State, two in Rochester and five on nearby farms, and four alcohol drops, three in Rochester and one in Buffalo, all of which were being operated by one or more of the defendants. The interlocking combinations of the defendants directly involved in each seizure attested to the syndicate character of the various operations, as well as to the fact that the syndicate was very much a family affair, with members of the Valenti family [6] and Frank Dimino, petitioner's brother-in-law and one of those who pleaded guilty (R. 2, 184), as its ringleaders. (R. 20–28, 32–34, 62, 63–67; R. 28–30, 247;

[6] Antonio, Joseph, Alphonse A., and Salvatore Valenti are all brothers of petitioner (R. 130, 133, 146, 185, 250), Alphonse J. Valenti, his son (R. 133, 185, 250), and Mary Valenti, his wife (R. 146).

R. 31–32, 247–248; R. 34–38, 68–69; R. 248; R. 248; R. 82–85, 248–249; R. 249; R. 249–250; R. 153–157, 192–195, 198, 199, 250; R. 102–106.)[7]

At least twelve cars used by the various defendants at different times were registered in the names of female relatives who never drove the cars, three of the registrants being sisters of petitioner (R. 78, 100–101, 101–102, 132, 135, 187, 188, 217, 218, 221, 248, 249). One of the cars was equipped with extra springs (R. 90–91) and new license plates were obtained on two of the cars and on a truck belonging to the defendant Capone, on affidavit that the old plates had been lost (R. 124–125, 157–159). The cars were all taken to the same place, the Central Chevrolet Company in Rochester, for repairs, and, although they were driven there by the various defendants, the repairs were always charged to the accounts of either Joseph Valenti or Frank Dimino (R. 85–97). One of the cars was seized at the alcohol drop at Buffalo (R. 248), two of them were driven from the alcohol drop at 60 Bellwood Place, Rochester, on two different occasions in 1941 by different defendants (R. 100–102), and one of them was used in Jamestown in 1940 by the defendant DeVita (R. 78). During 1940 these cars were continually parked together, in varying combinations, either at the Valenti homestead (R. 164)

[7] Record references are here arranged to cover each seizure in order of time of occurrence, beginning with September 25, 1935, and ending with April 17, 1941.

at 1113 East Main Street, Rochester, petitioner's residence at 19 Mayberry Street (R. 27), or his adjoining garage at 504 Atlantic Avenue (R. 26–27), at Frank Dimino's service station or home (R. 56–57, 148, 164), or at the Grotese Club in Rochester (R. 106–182). There was also direct evidence of personal association between the various defendants, usually in connection with the use of the syndicate cars either in Rochester or Jamestown (R. 73–74, 100–101, 110–111, 126, 130–131, 133, 136, 138, 139, 142, 143, 144, 146, 149, 150, 151–152, 153, 159–160, 162, 169, 170, 204, 212–213, 248) and of numerous long-distance telephone calls made to and from Frank Dimino's home and service station in Rochester to Buffalo (R. 54–56, 57), where one of the alcohol drops was seized on June 25, 1939 (R. 248), and to DeVita's residence at Jamestown, which had an unpublished phone number (R. 50, 57, 279–282).

The evidence of petitioner's participation in this conspiracy was as follows:

(1) In the early stages of the conspiracy, petitioner was directly involved in the operation of two illicit stills. Federal officers raided a barn on the Vandertweel farm at Irondequoit, New York, at midnight on September 25, 1935, and caught Carl Dimino operating a still. At 1:30 a. m. petitioner, dressed in street clothes covered by overalls, drove up to the still premises in a Buick car which contained coke and 5-gallon cans

similar to those found in the barn. Two days previously the officers had observed the same car, loaded with coke, being driven from petitioner's garage at 504 Atlantic Avenue, Rochester, adjoining his residence at 19 Mayberry Street, to the same still premises. (R. 21–28, 63–67.) In 1937 petitioner operated an illicit still on his garage premises at 504 Atlantic Avenue in a building which was formerly used as a restaurant. When a fire broke out at the place on September 9, 1937, a still was found in the basement of the old restaurant, set up for operation and still warm, together with alcohol and sugar bags. A second, dismantled, still was found in a connecting shed. Petitioner and his wife were convicted of possessing and failing to register the set-up still. (R. 36–38, 46, 67–70, 245.)

(2) In August 1939 petitioner rode in his own car with the defendants Frank Dimino and John DeVita from John DeVita's residence at 117 Allan Street, Jamestown, to downtown Jamestown, where the car, stopped for going through a red light, was found to contain an assortment of small pipe fittings, a hydrometer, and a water pump. The hydrometer was of the type commonly used for testing alcohol and the water pump was similar to one found at a still (R. 73–78, 81–83). Frank Dimino, who was operating the car at the time, pleaded guilty in the instant case and was one of the most obvious participants in the conspiracy

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(see *supra*, pp. 4–6). John DeVita, petitioner's other companion, who also pleaded guilty, had been arrested with the defendant Charles Salli at the alcohol drop at the Chicago Street garage in Buffalo on June 25, 1939, where one of the syndicate cars was seized. (R. 248.)

(3) Like the telephone number for DeVita's residence in Jamestown, petitioner's telephone number was unpublished and was used for a long-distance call from DeVita's residence on July 20, 1940. The unpublished telephone number was also found on a post card in the billfold of James Valenti (unrelated to petitioner, R. 249) when he was arrested during the seizure of one of the syndicate stills on September 8, 1939. (R. 82–83, 247–249, 280–281.)

(4) In 1940 petitioner's Buick sedan—the same one in which petitioner, Frank Dimino, and John DeVita were carrying still equipment in Jamestown in August 1939—was taken to the Central Chevrolet Company of Rochester for repairs, in the same manner as the falsely registered syndicate cars. The repair card was originally made out to Valenti, East Main Street (which would be Joseph Valenti). When the car was returned by the garage, the repairs were paid for in cash and the name "Valenti" was crossed out and "Frank Dimino" substituted. (R. 75, 88–89.)

(5) On November 12, 1940, Joseph Randazzo, an alleged coconspirator, who had been caught at

the Lash Farm still and who had rented the premises for the alcohol drop at 43 Hollister Street, Rochester (R. 249–250), was, on two occasions, seen driving petitioner's new Oldsmobile (R. 165–166). John DeVita, the Jamestown defendant, who pleaded guilty (R. 2), was also seen driving the same car on two different occasions (R. 78–79).

(6) During 1940 petitioner's cars were parked on innumerable occasions with one or more of the syndicate automobiles at the Grotese Club and at the Valenti homestead (R. 108–110, 111, 113, 120, 122, 123, 128, 129–130, 136, 139, 145–147, 162) and one or more of the various syndicate cars or John Capone's truck was constantly parked in front of or near petitioner's residence at 19 Mayberry Street, or in his adjoining garage or driveway at 504 Atlantic Avenue (R. 111–112, 113, 114, 115–116, 117, 118, 119, 120, 123, 124, 125, 128–129, 130, 132, 134, 137, 138–139, 140, 141, 143, 145, 147, 148, 152, 157, 158, 160–161, 162). In addition, there was direct evidence of personal contact between petitioner and other defendant members of the Valenti family, Frank Dimino, DeVita, and Randazzo (R. 73–74, 146, 169, 170, 212–213).

(7) In early 1941, before the alcohol drop at 60 Bellwood Place, Rochester, was seized, Joseph Valenti and Joseph Lo Tempio (not a defendant) were each, at different times, observed driving from the alcohol drop to petitioner's residence.

Joseph Valenti drove in one of the syndicate cars. Joseph Lo Tempio was later caught carrying alcohol in the same car he had driven to petitioner's residence. (R. 102–103.)

(8) Petitioner obviously had no regular occupation. He adduced evidence to show that he bought bankrupt stocks at auctions, but this evidence at best revealed no more than that he made a total of three or four purchases of bankrupt stock, two in 1938 or 1939, one in February 1941, and one in June 1941. (R. 238–239, 240–243.)

Most of the nineteen overt acts alleged as having been committed in furtherance of the conspiracy, including the operation of stills and alcohol drops, were proved by direct evidence (cf. R. 6–12 with *supra*, pp. 4–10, and R. 248–249).

ARGUMENT

1. Petitioner's contention that the evidence was insufficient to show his guilty association with the alleged conspiracy (Pet. 5–8) is plainly lacking in merit.

It is immaterial, as the court below pointed out (R. 288), that no single piece in the chain of circumstantial evidence against petitioner points conclusively to his guilt. The rule which he apparently invokes, but misinterprets, is that, where guilt depends upon circumstantial evidence, the evidence, considered *in toto*, must be inconsistent with the theory of innocence or, as sometimes stated, exclude every reasonable hypothesis ex-

cept that of guilty.[8] This means, we believe, no more than that a jury should not be allowed to speculate as to a defendant's guilt in a case where the circumstantial evidence, considered altogether, does not clearly point toward guilt. The rule, as stated by this Court in a different manner and as applied to the instant case, is that petitioner's conviction must be sustained if, taking the view most favorable to the Government, the evidence reasonably warrants the inference that he was associated with the conspiracy which he concedes the proof established (*Glasser* v. *United States*, 315 U. S. 60, 80; see also, *Abrams* v. *United States*, 250 U. S. 616, 619).[9]

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[8] This is the rule which is stated in four of the five cases upon which petitioner relies, i. e., *Kassin* v. *United States*, 87 F. (2d) 183 (C. C. A. 5); *Copeland* v. *United States*, 90 F. (2d) 78 (C. C. A. 5); *De Luca* v. *United States*, 298 Fed. 412 (C. C. A. 5); *Wright* v. *United States*, 227 Fed. 855 (C. C. A. 8). The other case he cites, *Paddock* v. *United States*, 79 F. (2d) 872 (C. C. A. 9), merely held that an instruction to the jury explaining the meaning of "reasonable doubt" was erroneous. For other cases stating the general rule referred to in the text, see *Hammond* v. *United States*, 127 F. (2d) 752 (App. D. C.); *Weiss* v. *United States*, 122 F. (2d) 675 (C. C. A. 5), certiorari denied, 314 U. S. 687; *United States* v. *Russo*, 123 F. (2d) 420, 423 (C. C. A. 3); *United States* v. *Mann*, 108 F. (2d) 354, 358 (C. C. A. 7); *Neal* v. *United States*, 102 F. (2d) 643, 648 (C. C. A. 8), certiorari denied, 312 U. S. 679; *Galatas* v. *United States*, 80 F. (2d) 15, 23 (C. C. A. 8), certiorari denied, 297 U. S. 711; *Ferris* v. *United States*, 40 F. (2d) 837, 840 (C. C. A. 9); *Kennedy* v. *United States*, 44 F. (2d) 131, 132 (C. C. A. 9).

[9] See also *United States* v. *White*, 124 F. (2d) 181, 185 (C. C. A. 2); *United States* v. *Novick*, 124 F. (2d) 107, 108

The evidence amply supports the inference that petitioner participated in the conspiracy. In 1935 he was caught at the Vandertweel Farm still at Irondequoit, New York, and in 1937 he was convicted of possessing and failing to register a still found on his garage premises at 504 Atlantic Avenue, Rochester. Two stills had been found on the premises, one of which was not being used. And, instead of indicating that petitioner abandoned his illicit operations after his conviction in 1937, the evidence compels the conclusion that he continued his operations on an even broader scale, but more under cover, and possibly as leader of the conspiracy.

Petitioner's constant association with all of the conspirators throughout the period of the con-

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(C. C. A. 2), certiorari denied, 315 U. S. 813; *United States* v. *Gallo*, 123 F. (2d) 229 (C. C. A. 2); *United States* v. *Beck*, 118 F. (2d) 178, 185 (C. C. A. 7), certiorari denied, 313 U. S. 587; *United States* v. *Potash*, 118 F. (2d) 54, 56 (C. C. A. 2), certiorari denied, 313 U. S. 584; *United States* v. *Mortimer*, 118 F. (2d) 266, 268, (C. C. A. 2), certiorari denied, 314 U. S. 616; *United State* v. *Pecorago*, 115 F. (2d) 245 (C. C. A. 2), certiorari denied, 312 U. S. 685; *United States* v. *Pandolfi*, 110 F. (2d) 736, 737 (C. C. A. 2), certiorari denied, 310 U. S. 651;; *United States* v. *Buckner*, 108 F. (2d) 921, 925–926 (C. C. A. 2), certiorari denied, 309 U. S. 669; *United States* v. *Manton*, 107 F. (2d) 834, 839 (C. C. A. 2), certiorari denied, 309 U. S. 664; *Pernatto* v. *United States*, 104 F. (2d) 427, 428 (C. C. A. 3); *Marino* v. *United States*, 91 F. (2d) 691, 699 (C. C. A. 9), certiorari denied, *sub nom. Gullo* v. *United States*, 302 U. S. 764; *Smith* v. *United States*, 62 F. (2d) 1061, 1062 (App. D. C.); *Goode* v. *United States*, 58 F. (2d) 105, 107 (C. C. A. 8).

spiracy was shown by direct evidence of his personal contact with some of the conspirators, the activity of the syndicate cars in and about his residence and garage, and constant mingling of his own car with the syndicate cars at other places, and the use of his car by Randazzo and DeVita. Moreover, the evidence clearly shows that the association was not an innocent one. The mere relationship of some of the defendants could hardly explain the extraordinary activity of the various syndicate cars. Rather, the relationship indicates that the conspiracy was a family affair, tending toward the belief that petitioner must have been involved in it, especially since his son and four of his brothers were participants and seven of the syndicate cars were registered in the names of three of his sisters. On different occasions, Joseph Valenti and Joseph Lo Tempio were seen driving directly to petitioner's residence from the alcohol drop at 60 Bellwood Place, Rochester. Petitioner had an unpublished telephone number, as did the Jamestown defendants. The unpublished number was found on a post card in the billfold of James Valenti (unrelated to petitioner) when he was arrested during the seizure of the still at East Eden, New York, on September 8, 1939. Petitioner's Buick was repaired at the Central Chevrolet Company in Rochester in August 1939 in Frank Dimino's name, just as were the falsely registered syndicate cars and John

Capone's truck. Petitioner had no regular occupation. With these facts as a background, it is practically impossible to explain away the fact that petitioner, accompanied by two of the confessed conspirators, Frank Dimino and John DeVita, used his car in Jamestown in August 1939 to carry still equipment (*supra*, pp. 7–8). These circumstances not only justify but compel the conclusion that petitioner was associated in the conspiracy. No sufficient reason appears why the concurrence of the district judge, the jury and the circuit court of appeals as to the sufficiency of the evidence should not be accepted as final. *Delaney* v. *United States*, 263 U. S. 586, 589–590.

2. After testifying on direct examination that he arrested Alphonse A. and Alphonse J. Valenti at the alcohol drop at 43 Hollister Street, Rochester, in the early morning on September 8, 1940 (R. 192–194), Government witness T. J. McGuire, an investigator of the Alcohol Tax Unit (R. 189), was asked on cross-examination by counsel for the other defendants (R. 19, 204) whether he had stated all of the conversation he had with the two boys that morning. He replied, "There is only one other item that I remember now that I haven't spoken here and that is—do you want that?" Counsel said, "Yes," and McGuire answered, "I looked at these youngsters and I said, 'Is this a nice place for you two kids to be? I would give a thousand dollars to have your father where you are. I do not get any fun

out of arresting 19-year-old boys' " (R. 207). Petitioner's counsel objected (R. 207) and petitioner now urges (Pet. 8–10) that he was prejudiced by the refusal of the trial court to exclude the statement (R. 283–284).

The statement was competent evidence unless it was immaterial and irrelevant [10] and, if it was immaterial and irrelevant, it obviously did not prejudice petitioner. Moreover, it did no more than reveal the possibility that McGuire was prejudiced against petitioner and it was this very fact which petitioner sought to bring out in his subsequent examination of McGuire, no doubt with the view of discrediting his entire testimony. McGuire was asked if he did not tell Mr. Rose of the Central Chevrolet Company that he was "going to throw all of the Valentis in jail" (R. 208), and then, when he denied making such a statement, was reproached thus, "You just told us a minute ago that you told the boys over at Hollister Street that you would rather have the father than the two boys" (R. 208–209). After McGuire admitted, "I did make that statement," counsel for the Government interjected, "What has that to do with it?" Counsel for petitioner replied, "If you have an objection why don't you make it?", thereby plainly showing that he considered the testimony advantageous to petitioner and shifting to the Govern-

[10] The testimony was not hearsay for McGuire was relating a conversation he had with one of the defendants.

ment the burden of objecting to it (R. 209). Thereafter, petitioner's counsel designedly attempted to elicit from McGuire an admission that he had also made the statement to petitioner (R. 210–212). The record therefore clearly disproves petitioner's innuendo (Pet. 10) that in his cross-examination he was "attempting to disprove the matters testified to or * * * seeking to prove facts inconsistent with them" and, instead, reveals that petitioner sought to use the statement to develop a showing of McGuire's bias toward him, thereby reflecting upon the credibility of McGuire's testimony on direct examination. Consequently, the statement did not prejudice petitioner and his original objection to it was waived by his adoption of it as evidence in his favor.

CONCLUSION

The case was correctly decided below and involves no conflict of decisions or important question of law. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

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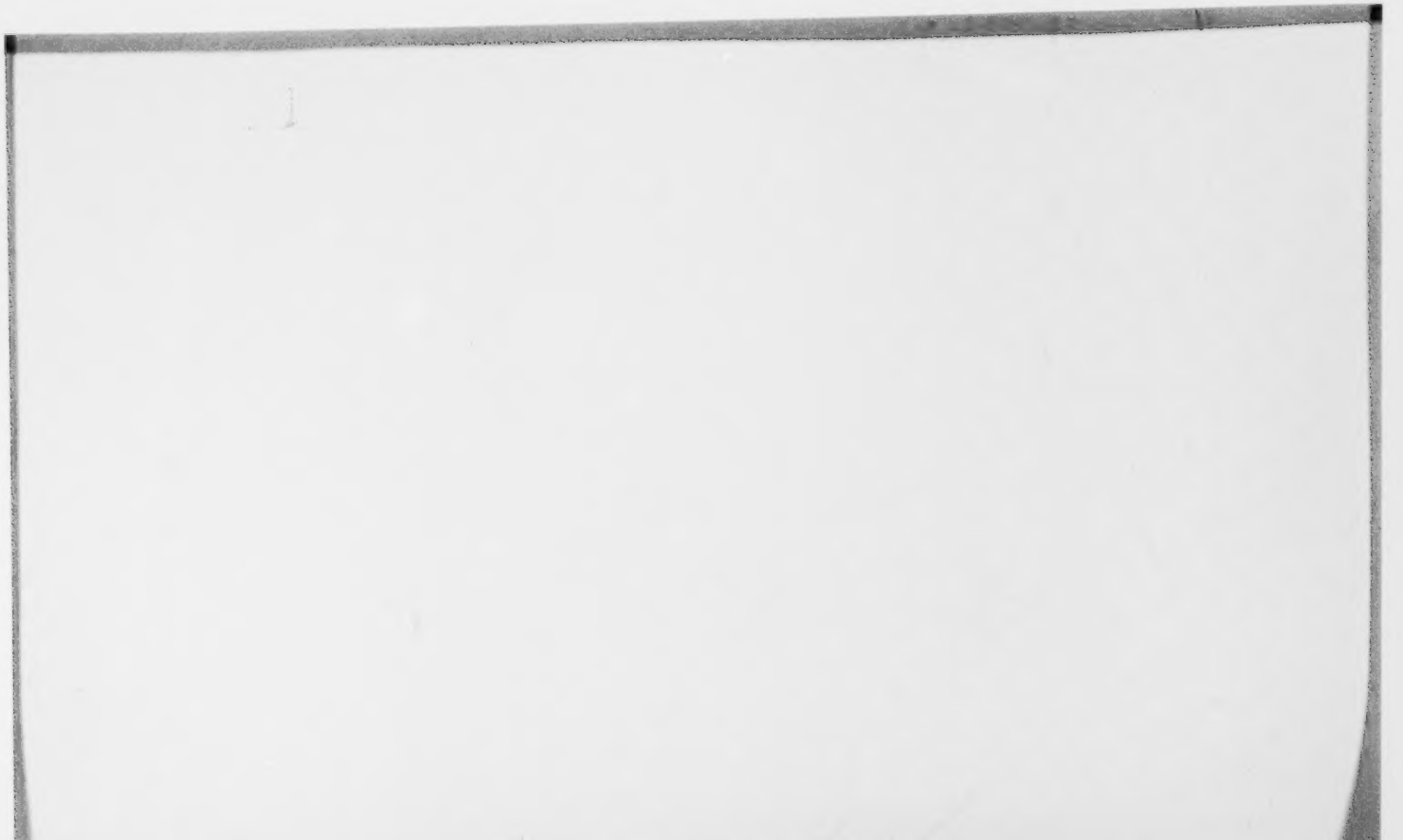

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IN THE

Supreme Court of the United States

May Term, 1943.

No. 955.

FRANK VALENTI,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

REPLY BRIEF FOR PETITIONER.

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REPLY BRIEF FOR PETITIONER.

The brief of the United States inadvertently misstates some of the evidence in the above case.

At page 8 (3) referring to De Vita's unpublished telephone number it appears that the telephone was in the name of Joseph Conti, the younger (Supplemental Record page 2), who was acquitted by the jury (R. 266).

At (R. 166) Randazzo drove petitioner's new Oldsmobile on November 12th, 1940 but the Oldsmobile driven by De Vita (79) was Alphonse Valenti's not the petitioner's and was a 1941 Oldsmobile Sedan—also the 1939 Chevrolet was owned by Rose Greco—not petitioner.

(6) Page 9. Much of the activity around 19 Mayberry Street was due to repairs to household at Mayberry Street (532-534) and so admitted by government agent.

(7) As to activity between Lo Tempio and Joseph Valenti the government agent (R. 103-104) admitted that Frank Valenti was never seen at Bellwood Place or Mayberry Street during the period of observation.

Answering Point II.

It is absurd to argue that the evidence of the witness Maguire did not prejudice the petitoner. As stated heretofore the attorney for petitioner objected to the conversation as stated by Maguire and excepted. At page 7 of the supplemental transcript of record on appeal that the record should show that the Court overruled the objection at folio 621, folio 207 and the attorney for the defendant, Frank Valenti also excepted. (Judge Clark (R. 290) notes that Court appears never in fact to have ruled on matter.)

It is respectfully submitted that the ruling grievously damaged the petitioner. The case was close, the jury deliberated nearly twenty-three hours (R. 264) and the prosecutor conducted his summation along a prejudicial line as indicated at the outset of Court's charge (R. 250).

As this Court said in Glasser vs. United States, 315 U. S. 60, 67:

> "Admittedly the case against Glasser is not a strong one * * *. In all cases the constitutional safeguards are to be jealously preserved for the benefit of the accused, but especially is this true where the scales of justice may be delicately poised between guilt and innocence. Then error, which under some circumstances would not be ground for reversal, cannot be brushed

aside as immaterial since there is a real chance that it might have provided the slight impetus which swung the scales toward guilt."

Under the circumstances what could the attorney for the petitioner do? Must he sit idly by when a court rules erroneously for fear that any questions asked will constitute waiver? Or must he concede its truth by failing to combat it? At least in New York State it is held that a party does not waive objections to the admission of evidence by endeavoring to rebut it.

Woods vs. Buffalo R. R., 35 A. D. 203; 54 N. Y. Supp. 735.

Middleworth vs. Lowery, 89 A. D. 418; 85 N. Y. Supp. 872-874.

Rothenberg vs. Filarsky, 62 N. Y. Supp. 721 at 722.

The right to have a case tried free of prejudice is too fundamental to allow anyone to guess as to the amount of prejudice that the defendant suffered in the instant ruling. In short the ruling was erroneous, affected a substantial right and was highly prejudicial.

McCandless vs. U. S., 298 U. S. 342 at 348.

A Writ of Certiorari should issue.

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